Supreme Court, U.S.
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Nos. 92-1350 and 92-1447

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

In re GEORGE L. PARKER,

Petitioner,

v.

GILBERT S. MERRITT, DAMON J. KEITH, and PIERCE LIVELY,

Respondents.

In re NORMAN A. MOSCOWITZ,

Petitioner,

v.

GILBERT S. MERRITT, DAMON J. KEITH, and PIERCE LIVELY,

Respondents.

ON PETITIONS FOR
A WRIT OF PROHIBITION OR MANDAMUS TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BY PETITIONERS

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ARGUMENT

I. Petitioners Have a Sufficient Personal Stake in the Proceeding to Obtain Standing.

Contrary to the arguments of the Respondents, Petitioners have a sufficient personal stake in this proceeding to obtain standing. In his Brief in Opposition, Demjanjuk concedes that "in some circumstances a stigmatizing injury might be sufficient to support standing." (citing *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984)). Brief in Opposition, at 5. Here, the outcome of this proceeding may have a direct effect on the Petitioners' livelihood.

Contrary to the Respondents' suggestion, Demjanjuk is not simply seeking the reversal of the Sixth Circuit's order permitting the extradition. Rather, he seeks specific findings of attorney misconduct which he seeks to use to obtain automatic reversal of the Sixth Circuit's order. *See* Demjanjuk's Proposed Findings of Fact, at 157 (arguing that "once fraud is shown, vacatur is required"). The Sixth Circuit's stated purpose is to determine whether the attorneys, Allan Ryan, Norman Moscowitz, George Parker and John Horrigan, engaged in "prosecutorial misconduct." *See* Orders, Aug. 17, 1992, Aug. 31, 1992.[1/] While these attorneys were called as witnesses in the proceeding below, the entire proceeding has been directed toward determining whether each of these attorneys violated his individual professional obligations.[2/] At the close of the evidence, Demjanjuk

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[1/] The personal nature of the proceeding is evidenced by the Sixth Circuit's insistence on naming the individual attorneys involved. Normally, a judicial inquiry into alleged prosecutorial misconduct does not involve the public naming of the attorney involved. *United States v. Modica*, 663 F.2d 1173, 1185 n.7 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

[2/] For example, at the initial oral argument, the panel of the Sixth Circuit questioned counsel for the United States about the particular role of each government attorney, including the Petitioners. Transcript, Aug. 11, 1992, Tape 2, at 4-6, 14-15, 28-29; Tape 3, at 4. At the special master hearing, Parker and Moscowitz were each questioned by Demjanjuk's counsel and the United States, as well as the Special Master, as to whether they had violated particular ethical rules. Hearing, Vol. I,

has submitted proposed findings of fact which include specific findings that Parker and Moscowitz violated their professional ethical obligations.[3/] Demjanjuk has succeeded in "turn[ing] the trial of the accused into a trial of government counsel." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 636 (2d Cir.), *cert denied*, 329 U.S. 742 (1946). Such findings would have a direct and substantial impact on the Petitioners' reputation and profession. As Petitioners have maintained, the Department of Justice cannot adequately protect the interests of the individual attorneys. In these circumstances, the Petitioners' personal stake in these proceedings is very real.

II. This Court Has Authority to Issue a Writ of Prohibition or Mandamus to the Sixth Circuit Court of Appeals at This Stage in the Proceeding.

Contrary to the Respondents' arguments, there is no procedural bar to the issuance of a writ of prohibition or mandamus to the Sixth Circuit. In their Briefs in Opposition, Respondents mistakenly rely on a line of cases, including *United States v. Ryan*, 402 U.S. 530 (1971), *Cobbledick v. United States*, 309 U.S. 323 (1940), and *FTC v. Alaska Land Leasing, Inc.*, 778 F.2d 577 (10th Cir. 1985), for the proposition that a nonparty witness is not entitled to seek Supreme Court review without being held in contempt.

Nov. 12, 1992, at 49-51, 54-55, 122-124, 126-132, 185-187, 196-197; Vol. II, Nov. 13, 1992, at 38-39, 48-49, 73-74; Vol. III, Jan. 14, 1993, at 45-46, 127-128, 146-147, 152-153; Jan. 15, 1993, at 214-220, 238-246. At the closing argument before the special master on April 30, 1993, Demjanjuk's lawyer urged that the special master make separate determinations that Moscowitz and Parker, among others, each violated their personal ethical obligations.

3/ Demjanjuk's proposed findings include findings that Parker, Moscowitz, and others consciously disregarded their ethical obligations under the Model Code of Professional Responsibility (1980) EC 7-14 and 7-20. As legal authority for these findings, Demjanjuk relies upon the provisions of the Model Code, various court decisions addressing ethical duties, and various treatises on legal ethics. (Proposed Findings, March 29, 1993, at 112-121).

Respondents' reliance on this authority is misplaced because these cases involve review of the issuance of subpoenas by district courts, rather than circuit courts of appeals. Section 1291, 28 U.S.C., grants automatic review as of right of district court decisions by the circuit courts of appeal only where the district court decision is considered "final." This statutory provision has been interpreted to require that a nonparty witness can only obtain circuit court appellate review as of right if the witness goes into contempt. The courts impose this "finality" requirement to limit "the harassment and cost of a succession of separate appeals from various rulings to which a litigation may give rise." *Cobbledick*, 309 U.S. at 325.

In contrast, Supreme Court review of circuit court orders is not limited to "final" decisions. R. L. Stern, E. Gressman, S. M. Shapiro, *Supreme Court Practice*, § 4.18 (6th ed. 1986). Rather, the Supreme Court is authorized under the All Writs Act and the Supreme Court Rules to review any circuit court order on a petition for writ of prohibition or mandamus if such review is in aid of the Court's appellate jurisdiction to correct a clear abuse of judicial discretion or usurpation of judicial power, regardless of whether the order is considered "final." *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Maryland v. Soper*, 270 U.S. 9 (1926); *Perlman v. United States*, 247 U.S. 7 (1918); 28 U.S.C. § 1651; Supreme Court Rules 10, 20.

Here, Petitioners were faced with an order by the Sixth Circuit which compelled their compliance with the Sixth Circuit's subpoena. In this situation, the Petitioners should not have been required to be held in contempt prior to obtaining Supreme Court review because this Court's discretionary review authority does not depend on whether the circuit court order is final. Because the fact-finding investigation was improperly being conducted by the Sixth Circuit[4/]

[4/] Petitioners have urged that this proceeding should have been remanded to the District Court in the first instance.

rather than the District Court, the Petitioners' only avenue to obtain appellate review was by discretionary Supreme Court review.[5/]

Contrary to the Respondents' claim, the fact that the Petitioners' have already testified does not moot their claims. Petitioners did not object merely to the fact that they were required to give testimony. Rather, they objected to the Sixth Circuit's authority and jurisdiction to conduct the entire proceeding.[6/] A federal court is permitted to consider its own jurisdiction at any stage in the proceeding, on its own motion or at the suggestion of the parties. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588 (1939); *Dunton v. County of Suffolk*, 729 F.2d 903, 910 (2d Cir. 1984). The fact that

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[5/] Contrary to the Respondents' suggestion, allowing the Petitioners to obtain Supreme Court review in this case will not open the door for every witness appearing before a district court to obtain appellate review without being held in contempt. Rather, the rule urged here will only apply in the future where: (1) a circuit court, rather than a district court, is conducting a fact-finding investigation and issues an order compelling compliance with its subpoena, and (2) Supreme Court review is authorized under the Court's discretionary authority on the ground that the circuit court is acting beyond its judicial power.

[6/] Demjanjuk mischaracterizes the Petitioners' objections when he suggests that the Petitioners objected to the proceeding because they were concerned about the possible adverse publicity which might surround their testimony. See Brief in Opposition to Parker Petition, at 17-18, Brief in Opposition to Moscowitz Petition, at 11-12 (arguing that Petitioners' objections are moot because "[t]his testimony was widely covered in the national press" and "all of the evidence surrounding his involvement with the Demjanjuk case is now a matter of public record"). Their objection was specifically to having to testify in this proceeding.

Moscowitz and Parker object to the Sixth Circuit proceeding because: 1) the Sixth Circuit does not have jurisdiction to reopen the habeas corpus proceeding after Demjanjuk has already been extradited to stand trial in Israel; 2) the Sixth Circuit improperly delegated the proceeding to a special master; 3) the Sixth Circuit failed to remand the investigation to the District Court to conduct the investigation in the first instance; 4) the Sixth Circuit has failed to protect the due process rights of the individual attorneys because of its denial of certain procedural safeguards; and 5) the Sixth Circuit has improperly given Demjanjuk the lead role as the "prosecutor" in conducting the investigation.

the Petitioners have already testified does not moot the Petitioners' substantive objections to the Sixth Circuit's jurisdiction to conduct this proceeding. *Church of Scientology v. United States*, 113 S.Ct. 447, 452 (1992). Furthermore, Petitioners should not be required to await a decision by the Sixth Circuit before seeking Supreme Court review. This Court has authority to correct the Sixth Circuit's usurpation of judicial power before the Sixth Circuit proceeding continues any further.

Contrary to the Respondents' suggestion, Petitioners are permitted to obtain appellate review of the Sixth Circuit's actions even though they have not formally intervened as parties. A nonparty may appeal an order whenever he has an interest that is affected by the court's judgment and the equities weigh in favor of hearing the appeal. In these circumstances, the nonparty is not required to intervene as a formal party. *See, e.g., Perlman v. United States*, 247 U.S. 7 (1918); *United States v. International Brotherhood of Teamsters*, 931 F.2d 177, 183-84 (2d Cir. 1991); *United States v. Badger*, 930 F.2d 754, 756 (9th Cir. 1991); and cases cited in Moscowitz Petition, at 3 and Parker Petition, at 20-21.

CONCLUSION

For all of the foregoing reasons, Petitioners pray that this Court grant the Petitions for Writ of Prohibition or Mandamus.

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